Sexual Assault Prevention and Response Program

Jane Lux
Program Coordinator
NGB-J1
703-601-0577
Jane.Lux@us.army.mil
CTR – Alutiiq International Solutions, LLC

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Sexual Assault Prevention and Response Training

Block Overview

- Overview of base level legal organizations (JAG, GC)
- The Modern U.S. Military Justice System
- Jurisdiction
- Disciplinary Process
  - Article 15 & Court-Martial
- Victim Witness Assistance Program (VWAP)

JAG

- The Judge Advocate General's Corps provides legal support for military operations; advocates and litigates to preserve command prerogatives; administers civil and criminal law programs; educates and counsels leaders and personnel in the law
- SJA is the commander's legal advisor

Modern Military Justice System

- US Constitution
  - Congress may make rules for land and naval forces
  - President is Commander in Chief
- The Uniform Code of Military Justice (UCMJ)
  - Federal law passed in 1950 and effective in 1951
  - 1950 statute still the basic structure today
  - 1969: Enhanced role of judges, defense counsel
  - 1984: Many procedural and evidentiary rule changes
- Manual for Courts-Martial

Manual for Courts-Martial

- First MCM published in 1951
- Executive Order issued by the President
- Reviewed annually by Joint Service Committee on Military Justice

Why a Separate Military Justice System?

- World-wide mission
- Unique military offenses
- Disciplinary requirements

UCMJ Jurisdiction

- Military members are subject to the UCMJ world-wide, on and off duty, on and off base
- Concurrent jurisdiction may still exist
  - Jurisdiction may be shared with State, Federal, or Foreign government
  - Typical considerations
    - Location of crime
    - Duty status of accused
    - Victim's status
    - Type of offense - military specific
  - Status of Forces Agreements (SOFAs)

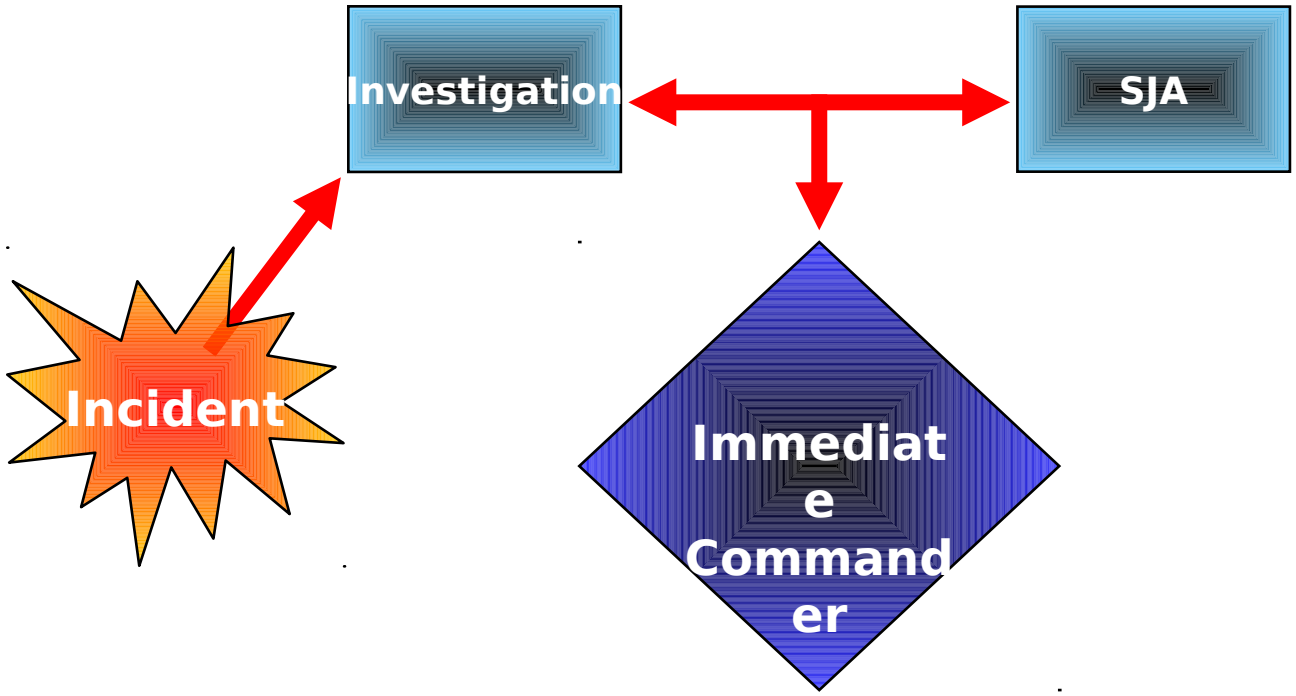
UCMJ Jurisdiction

- Reserve Component Issues
- Army/Air Force Reserve Active Duty (AD) Tours
  - Inactive Duty For Training (IDT)
- Army/Air National Guard (ANG)
  - State Status: belong to Governor of their state
  - Federal Status: attached to AD unit

Military Justice System

- Commander-driven system
  - Immediate unit commander
  - Court-martial convening authority
  - Commanders must administer military justice fairly and impartially, while maintaining good order and discipline
    - Requires positive involvement
    - Must ensure fair and open process
    - Must be even-handed
- Staff judge advocate advises and executes decisions
- Individual judge advocates perform unique roles

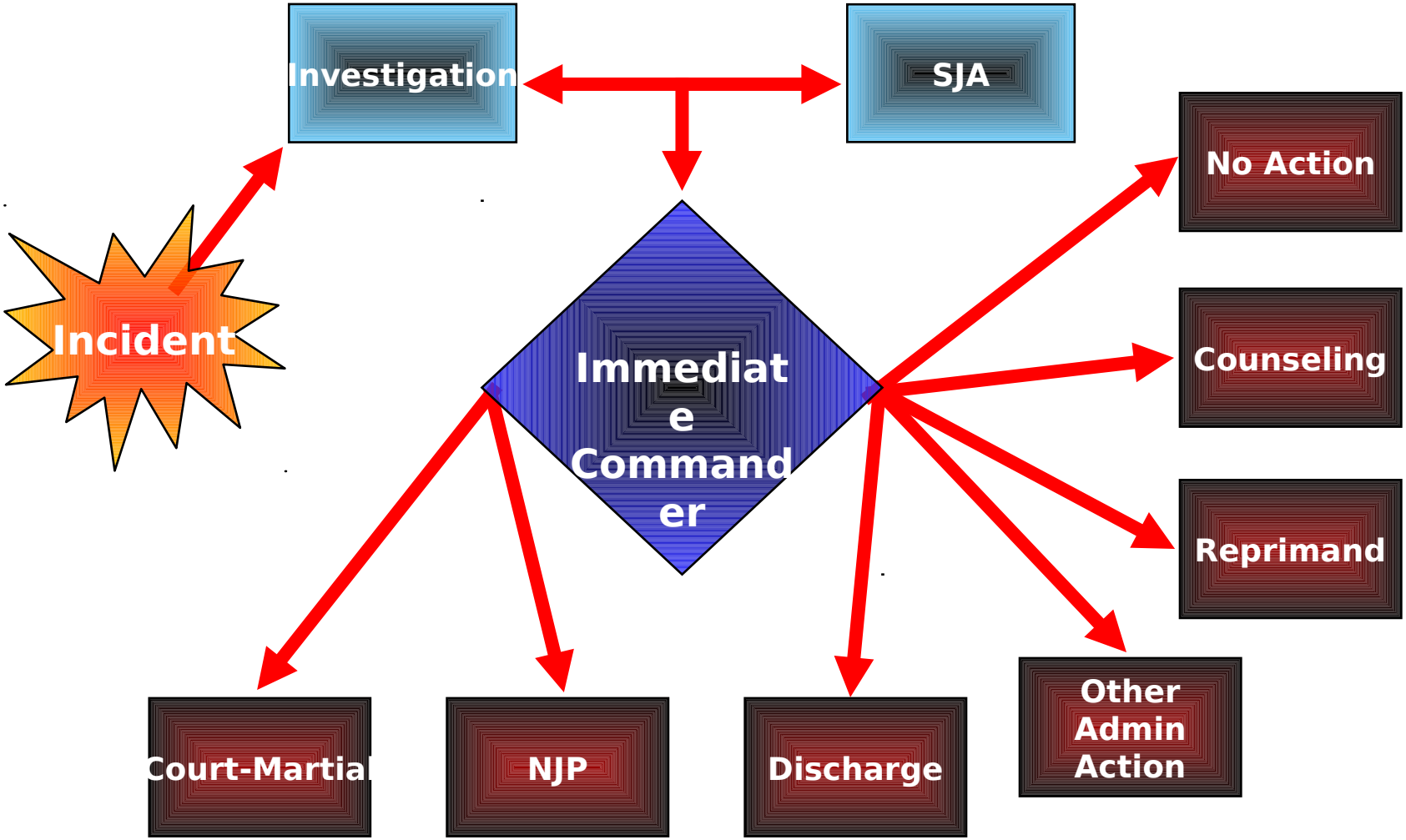
Disciplinary Process



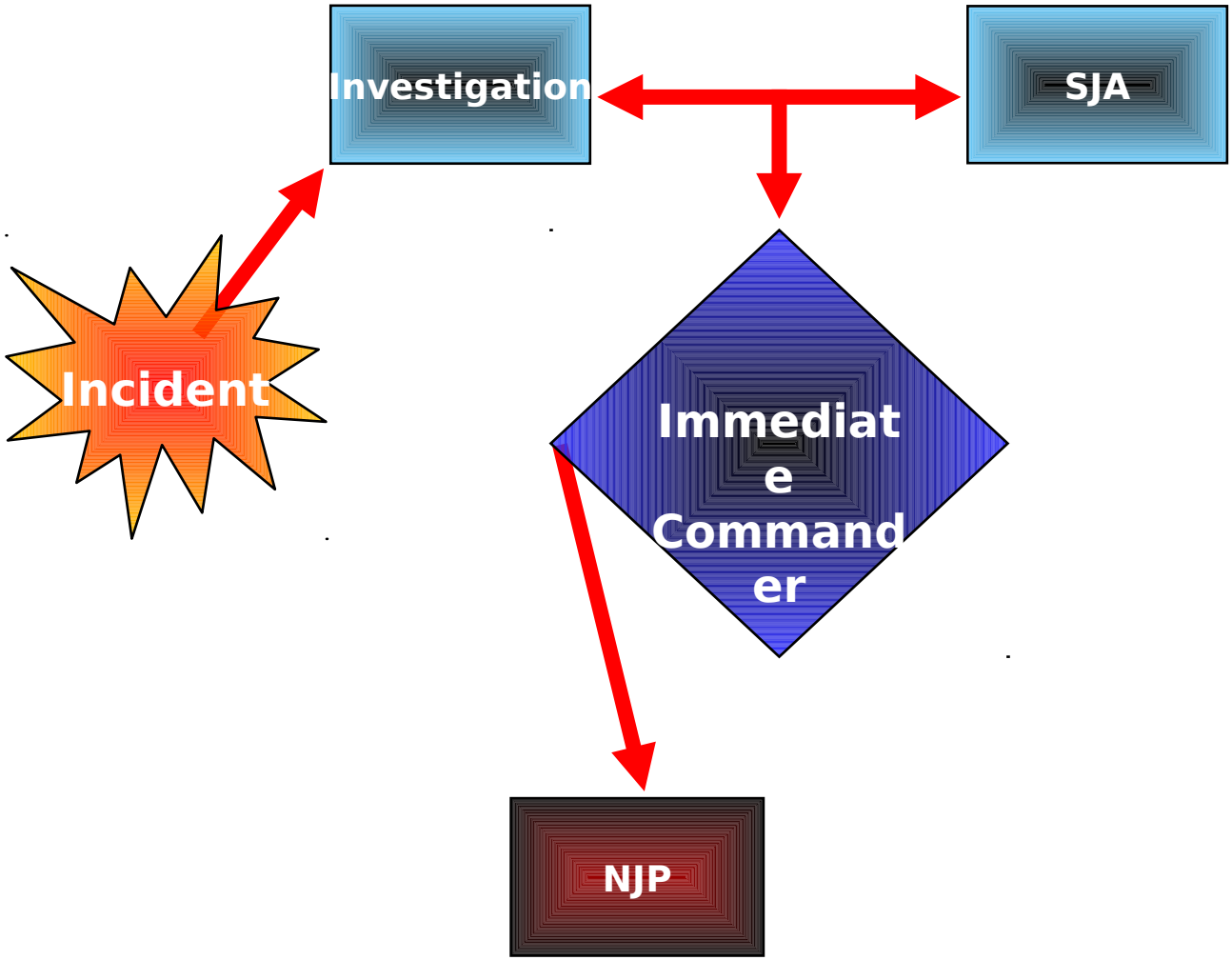
No Contact / Military Protective Orders (MPOs)

- Individuals can be ordered not to have contact with victim
  - Breach is a crime
- MPOs are formal notification to subject and victim that the commander has issued an order prohibiting contact or communication and may include other actions that support the prohibition

Disciplinary Process



Disciplinary Process



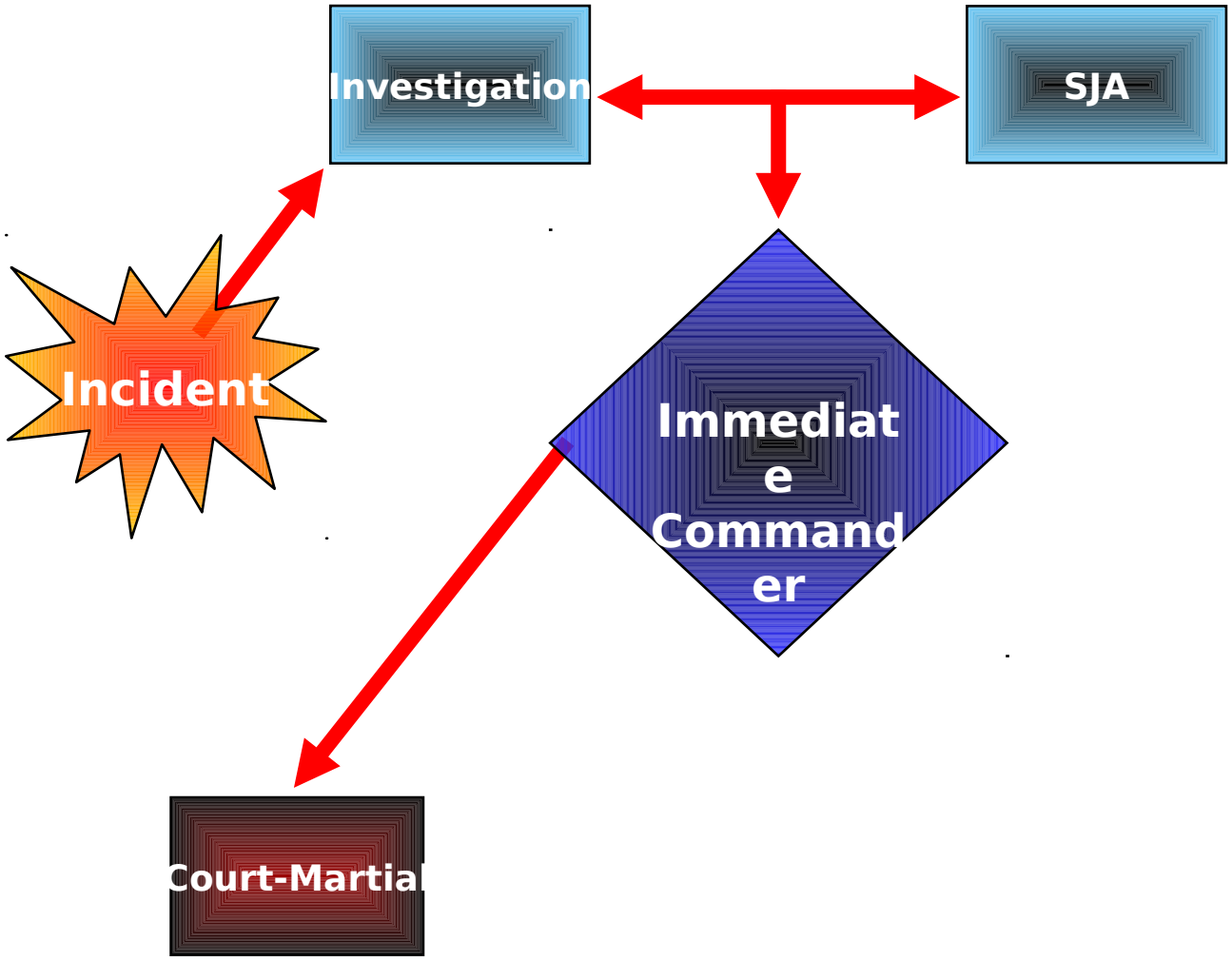
Nonjudicial Punishment Article 15, UCMJ

- For minor offenses
  - Shorter statute of limitations (2 years)
- Not a criminal conviction
- No “burden of proof” except that…
  - Member may turn down the Article 15 and demand trial by court-martial
- Service member has right to seek counsel
- Member can present evidence / witnesses
- The commander
  - Decides whether member committed offenses alleged
  - Imposes appropriate punishment

Nonjudicial Punishment Article 15, UCMJ

- Punishments include reduction and forfeiture of pay
  - Punishments differ based upon the rank of the imposing commander and the rank of the Service member
  - No confinement
- Offender can appeal to next commander

Disciplinary Process



Types of Courts-Martial

- Summary Court-Martial
  - One officer
  - Accused can refuse
  - Limited punishment (30 days confinement)
- Special Court-Martial
  - 3 officer (minimum) panel; can have enlisted members
  - Military judge presides, can hear without members
  - Max sentence: bad conduct discharge; confinement for one year; forfeitures of 2/3 pay for one year; reduction to lowest enlisted grade

Types of Courts-Martial

- General Court-Martial
  - 5 officer (minimum) panel; can request enlisted members
    - Minimum 12 members in capital case
  - Military judge presides, members required in capital cases
  - Max sentence: punishment authorized for offense, can include death, confinement for life

GCM Convening Authority

- Commander (Usually Division/Wing level or higher)
- Responsibilities
  - Refers charges to trial
  - Selects members
  - Reviews the results and approves or disapproves findings and sentence
  - Considers whether clemency appropriate

Military Court Members

- Chosen for their age, experience, judicial temperament by the Convening Authority
- Usually officers
  - Can include enlisted if the accused is enlisted and requests enlisted members
- May ask questions and request witnesses

Military Judges

- Qualifications
- Responsibilities
- Chain of command
- If accused pleads guilty, must do a detailed inquiry with accused to ensure he is in fact guilty

Military Counsel

Trial Counsel

- Represents the United States
  - Duty to zealously represent client
- Responsible to SJA

Defense Counsel

- Represents the accused
  - Duty to zealously represent client
- Independent chain of command
- Provided at no cost

Pretrial Confinement

- Requirements
  - An offense triable by court-martial has been committed,
  - The person being confined committed it, and
  - Confinement is required by the circumstances, which requires a finding that either the member is likely flight risk, or poses a serious risk of further misconduct potential, and lesser forms of restraint are inadequate
- Triggers the speedy trial clock (120 days)
- Subject to review
  - 48 hour 7 day Judicial
- Lesser forms can be imposed (restriction etc)

Pretrial Agreements

- Agreement between convening authority and accused
  - Accused offers to plead guilty to some or all offenses
  - CA agrees to limit sentence
    - Frequently cap on confinement; type of punitive discharge authorized; monetary penalties) or take other action (refer to lesser court-martial; not pursue administrative discharge; dismiss some charges; etc)
- MJ conducts inquiry as to agreement and accused's understanding of terms
- Members not told about PTA

Discharge in Lieu of Trial

- Enlisted may submit request for discharge in lieu of court-martial ("Chapter 10 or 4")
  - Convening authority is approval authority
  - If granted, usually under other than honorable conditions
  - Court-martial process ceases
- Officers may submit resignation ("RILO")
  - SECARMY/SECAF (or designee) is approval authority
  - If granted, usually under other than honorable conditions
  - Court-martial process ceases

Article 32 Investigation

- If general court-martial under consideration, pretrial investigation under Article 32, UCMJ, required
  - Charges investigated to see if trial warranted, and at what level
  - An accused has the right:
    - To be present and to be represented by counsel
    - To provide testimony or offer other evidence
    - To question witnesses
    - To review the evidence
    - To (normally) have an open and public hearing
  - Accused may waive Article 32

Anatomy of a Trial

- Bifurcated: guilt or innocence then sentencing if necessary
- Article 39a sessions
- Arraignment
  - Forum Selection (can elect to go military judge sitting alone)
  - Motions
  - Pleas
- If Guilty Plea then Care inquiry
  - MJ puts accused under oath and advises the accused of the elements of the offenses
  - Accused must satisfy the MJ that accused is guilty by admitting all of the facts necessary to prove the elements
  - If accused can't do so, guilty plea is rejected and not guilty plea entered

Anatomy of a Trial

- Voir Dire
- Challenges to members
  - Preemptory
  - For cause
- Opening statements
- Prosecution case
- Defense case, if any
- Rebuttal / Surrebuttal
- Closing arguments
- MJ instructs members as to law
- Members retire to deliberate
  - Unanimous vote not required

Anatomy of a Trial

- Findings announced
- Sentencing phase if required
  - If bench trial, MJ imposes sentence
  - If members, same members impose sentence
  - If guilty plea, accused can elect member or MJ to sentence
- Maximum sentence determined by lesser of punishment authorized for type of court or for offenses convicted
- Prosecution Sentencing Evidence
  - Victim Impact Statements
- Defense Sentencing Evidence
- Rebuttal (Surrebuttal as permitted)
- MJ instructs on law

Anatomy of a Trial

- Members deliberate
- Announcement of sentence
- Any confinement begins immediately, unless deferred

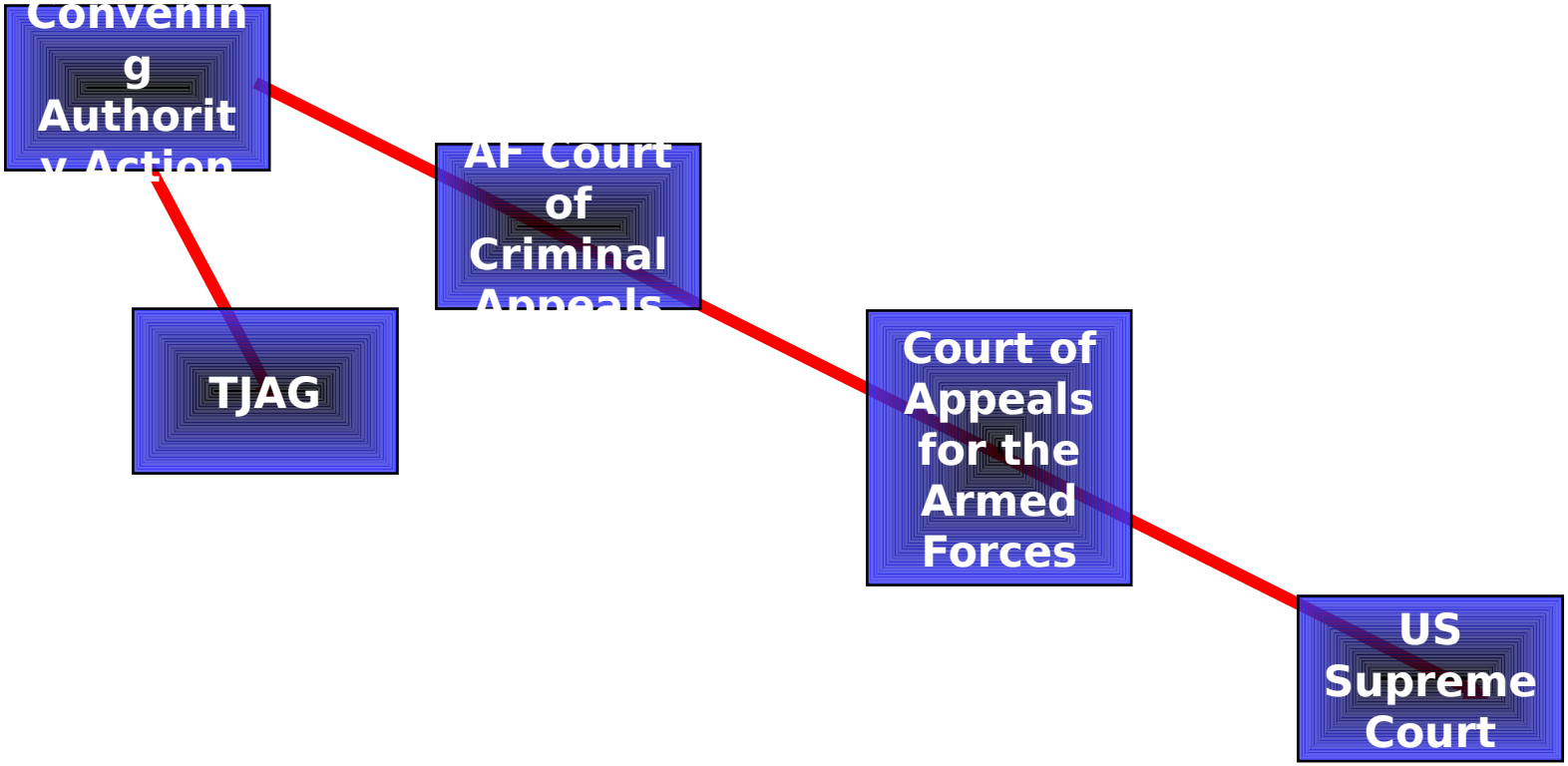
Sentencing

- Punitive discharge
  - Dismissal (officers); Dishonorable; Bad Conduct
- Confinement
  - Can be local confinement or central facility
- Reductions in rank
  - Adjudged or Deferred
- Forfeitures
  - Adjudged, Deferred, Waived

Post-Trial Process

- Record of Trial (ROT) transcribed
- ROT authenticated by MJ
- ROT and SJA Recommendation (if required) served on accused
- Accused may submit matters for the convening authority to consider
- Action by convening authority
  - Findings and sentence
- Appellate process

Post Convening Authority Process



Appellate Review

- Counsel provided
- Courts of Criminal Appeals
  - Mandatory if punishment includes a punitive discharge or confinement for one year or greater
  - Fact finding power
- Discretionary review at:
  - US Court of Appeals for the
  - Armed Forces
  - United States Supreme Court

Advocate's Role in Court-Martial Process

- Safety-Security-Support
- Education about the MPO process
- General education about the criminal justice system
- Support victim and VWAP Liaison interactions
- Encourage, assist and facilitate the victim's use of the multidisciplinary support structure
- Ongoing emotional support of the victim

Typical Victim Participation

- Pretrial
  - Interviews with government and defense counsel
- Article 32 Investigation
- Trial
  - Direct
  - Cross-examination
- Sentencing
  - Victim impact testimony

Typical Victim Issues

- Victim's consent
  - Refuted with physical evidence and/or traumatic responses
  - Privacy issues associated with using trauma evidence
- Victim's sexual history
  - MRE 412 Rape Shield exceptions
- Victim's mental health history
- Collateral Misconduct

Victim and Witness Assistance Program (VWAP)

VWAP Policy

- DoD personnel must treat victims and witnesses with fairness and respect
  - Bases for program requirements: Federal statutes, Department of Defense implementing directives, Air Force Instruction
- Applies in all cases in which criminal conduct adversely affects victims or in which witnesses provide information regarding criminal activity
- Victim: A person who suffered direct physical, emotional, or financial harm as the result of an offense
- The government must reasonably protect V/W from the accused

VWAP Rights

- Victims have statutorily designated advisory role in decisions involving prosecutorial discretion (e.g. plea bargains)
  - Victim's views considered but DO NOT supersede AF's decision-making power
- Right to attend public court sessions
  - Unless judge determines testimony would be materially affected if they hear other testimony
- Right to available restitution
- Right to be informed about conviction, sentencing, imprisonment, parole eligibility & release

VWAP Lessons Learned

- Particular problems when communicating with/through third party representative
- Explain PTAs, stipulations – the victim should have at least a sense of what a stipulation of fact will say, particularly if there is media interest in the case
  - The specifics will be reported – and the terms will present a picture
- Victims need to understand the outcome and what will happen next

Military Justice Summary

- Separate system with a unique purpose
- Procedural safeguards and fairness
- System created by Congress, administered by the President as Commander-in-Chief
- Provides a flexible, worldwide basis for maintaining discipline while providing a just result

RAPE

Article 120, UCMJ

New Article 120, UCMJ

- **FY 06 National Defense Authorization Act significantly changed Article 120**
  - **Effective 1 Oct 07**
- **Start with title**
  - **Now: *Rape***
  - **1 Oct 07: *Rape, sexual assault, and other sexual misconduct***

New Article 120, UCMJ

- **New Article 120 very different from other UCMJ Articles**
  - **~4 lines to ~5 pages**
  - **More closely follows Title 18 in addressing sexual offenses**
  - **Subsumes some offenses formerly under Article 134, UCMJ**

This is a very different approach for the UCMJ in sexual assault offenses

New Article 120, UCMJ

- **May see Executive Order approving new MCM provisions by 1 Oct 07**
- **New Article 120 only applies to offenses committed on and after 1 Oct 07**

New Article 120, UCMJ

- **The new Article 120 sets out 14 offenses**
- **36 different possible ways to charge**

- **Rape**
- **Rape of a child**
- **Aggravated sexual assault**
- **Aggravated sexual assault of a child**
- **Aggravated sexual contact**
- **Aggravated sexual abuse of a child**
- **Aggravated sexual contact with a child**
- **Abusive sexual contact**
- **Abusive sexual contact with a child**
- **Indecent liberty with a child**
- **Indecent act**
- **Forcible pandering**
- **Wrongful sexual contact**
- **Indecent exposure**

New Article 120, UCMJ

- **The new Article 120 sets out 16 definitions:**

- **Sexual act**
- **Sexual contact**
- **Grievous bodily harm**
- **Dangerous weapon or object**
- **Force**
- **Threatening or placing that other person in fear" for certain offenses**
- **Threatening or placing that other person in fear" for certain other offenses**
- **Bodily harm**
- **Child**
- **Lewd act**
- **Indecent liberty**
- **Indecent conduct**
- **Prostitution**
- **Consent**
- **Mistake of fact as to consent**
- **Affirmative defense**

New Article 120, UCMJ

- **The new Article specifies special rules regarding proof of, and the effect of:**

- **Ages of children**
- **Threats**
- **Marriage**
- **Consent and mistake of fact as to consent**

New Article 120, UCMJ

- **Offenses get categorized by combinations of**
  - **Age of the victim**
  - **Nature of the sexual conduct**
  - **Manner the sexual conduct came about**
- **Done by threads leading through multiple paragraphs**

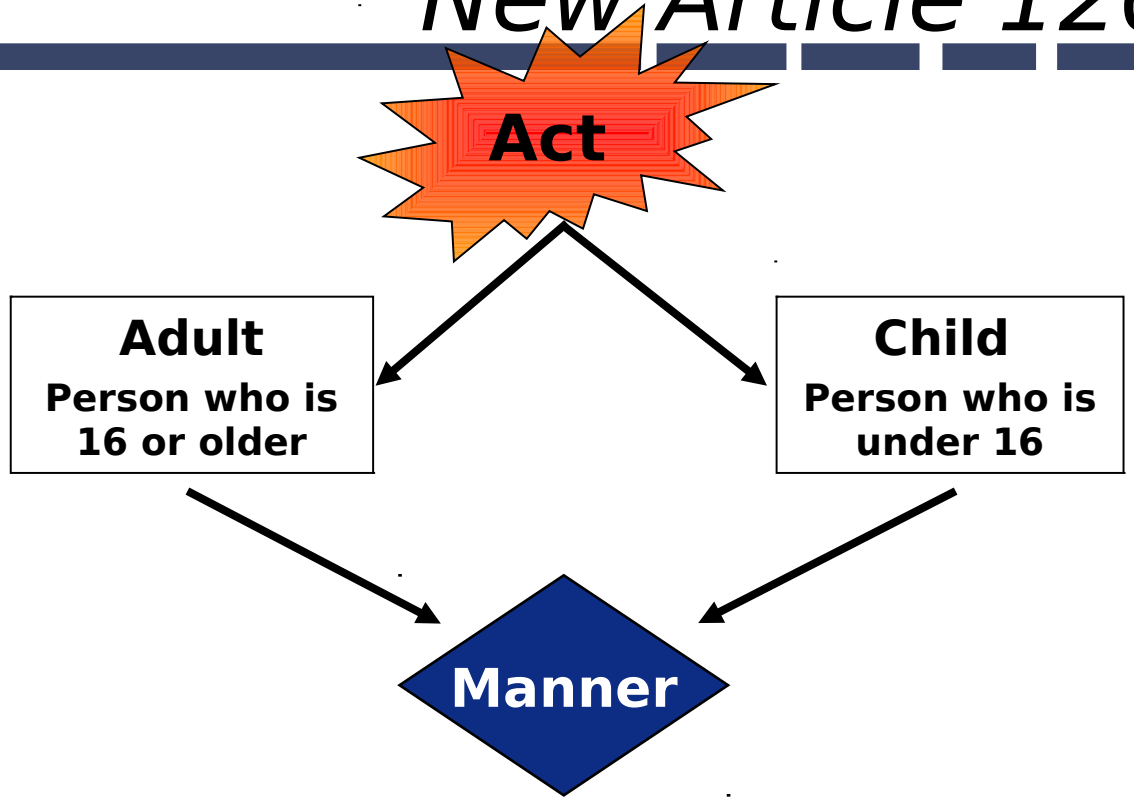
Art 120 (t) (2)

Art 120 (e): Aggravated sexual contact. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act,

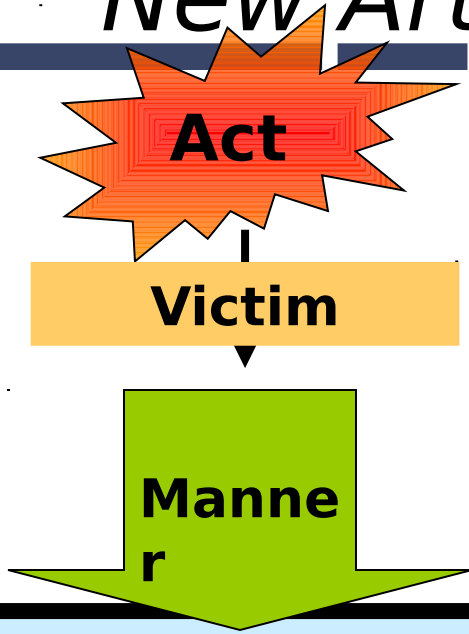
Art 120 (a)

Art 120 (t) (1)

New Article 120, UCMJ



New Article 120, UCMJ

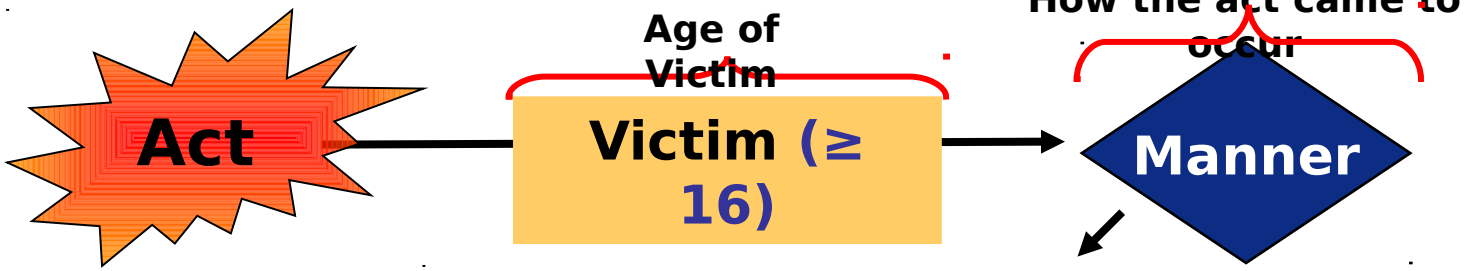


Age of Victim

How the act came to occur

- Force
- Grievous Bodily Harm
- Threatening or placing in fear of death, GBH or kidnapping
- Threatening or placing in fear other than death, GBH or kidnapping
- Rendering unconscious
- Administering by force or threat of force, or w/o knowledge or permission, drug or intoxicant that substantially impairs the ability to appraise or control conduct

New Article 120, UCMJ



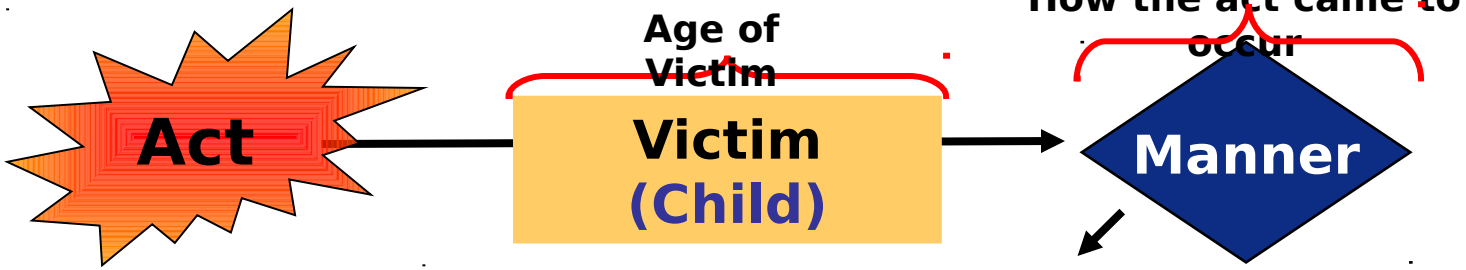
Lewd Act	Indecent Exposure	Sexual Act	Sexual Contact	Indecent Act

Nature of the Act

Crimes

- **Rape**
- **Aggravated sexual assault**
- **Aggravated sexual contact**
- **Abusive sexual contact**
- **Indecent act**
- **Forcible pandering**
- **Wrongful sexual contact**
- **Indecent exposure**

New Article 120, UCMJ



Lewd Act	Indecent Liberty	Indecent Exposure	Sexual Act	Sexual Contact	Indecent Act

Nature of the Act

Crimes

- **Rape of a child**
- **Aggravated sexual assault of a child**
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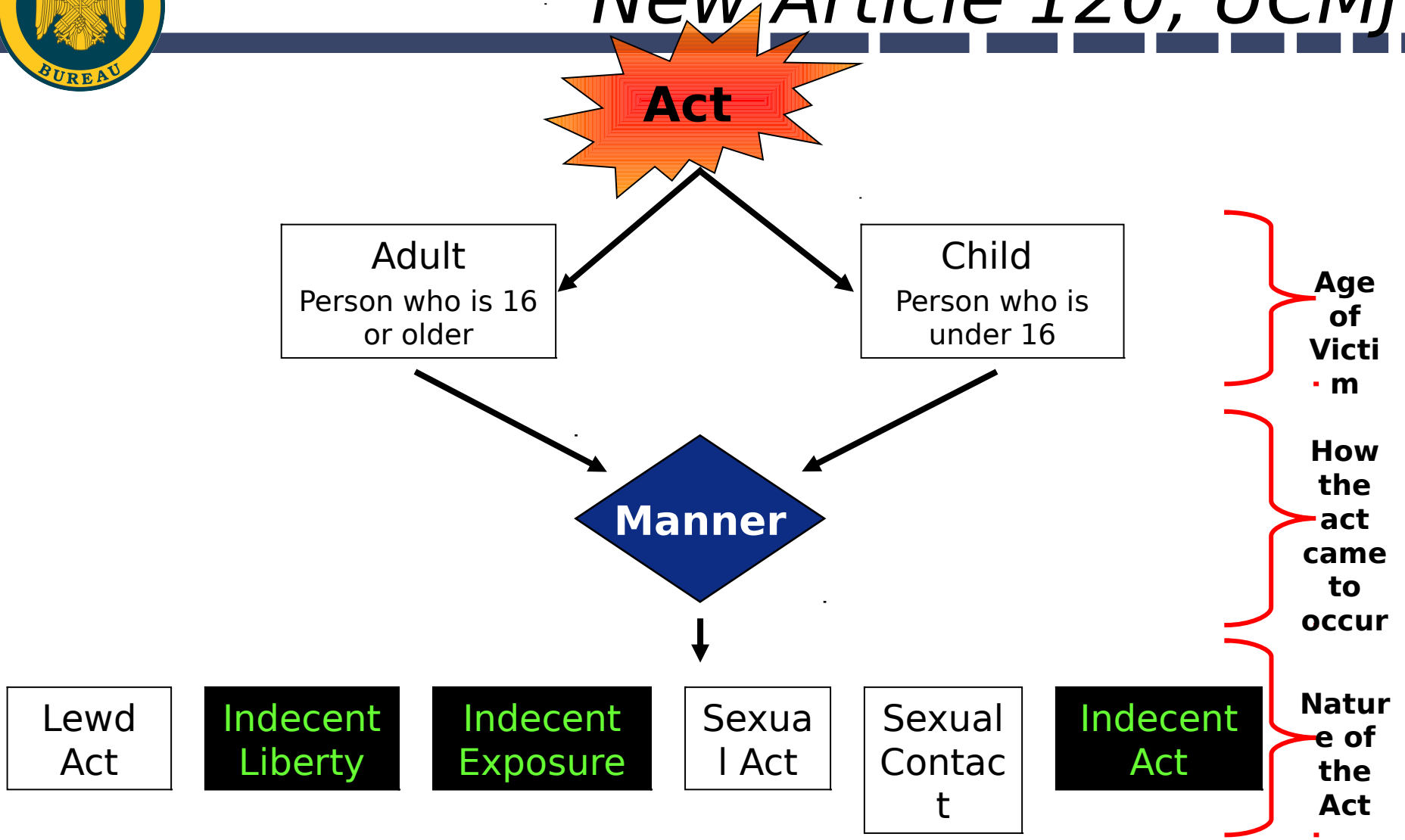
New Article 120, UCMJ



New Article 120, UCMJ

Sexual Act

- **Penetration**
  - **Penis, digital or object, however slight, of the genital opening**
- **Intent to abuse, humiliate, harass, degrade any person or,**
- **Arouse or gratify the sexual desire of any person**

Sexual Contact

- **Intentional touching**
  - **directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or**
- **Intentionally causing another person to touch,**
  - **directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person,**
- **<u>With</u> intent to abuse, humiliate, or degrade any person, or**

New Article 120, UCMJ

Lewd Act

- **Intentional touching the genitalia of another person,**
  - **NOT through the clothing, or**
- **Intentionally causing another person to touch, the genitalia of any person**
  - **NOT through the clothing,**
- **<u>With</u> intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person**

Definition of Sexual Assault

- "Consent" shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion or when the victim is asleep, incapacitated, or unconscious

This a definition for training and education – it does not affect the definition of any offenses under the UCMJ

Consent

- Consent is not an ‘issue’ in sexual assault offenses
  - Exception: Wrongful sexual contact
    - Without legal justification or lawful authorization
    - Without that other person's permission
- Consent is an affirmative defense for
  - Rape
  - Aggravated sexual assault
  - Aggravated sexual contact
  - Abusive sexual contact

Consent

- Consent means ‘words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person’
- Provides examples of what is not consent
  - An expression of lack of consent through words or conduct
  - Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear
  - A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue

Consent

- A person cannot consent to sexual activity if
  - Under 16 years of age or
  - Substantially incapable of
    - Appraising the nature of the sexual conduct at issue due to
      - Mental impairment or unconsciousness resulting from consumption of alcohol, drugs
      - Mental disease or defect rendering the person unable to understand the nature of the sexual conduct
    - Physically declining participation in the sexual conduct at issue; or
    - Physically communicating unwillingness to engage in the sexual conduct at issue

Mistake of Fact as to Consent

- Accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented
- Must have existed in the mind of the accused and been reasonable under all the circumstances
  - The ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented

Mistake of Fact as to Consent

- Cannot be based on the negligent failure to discover the true facts
- Negligence is the absence of due care
- Due care is what a reasonably careful person would do under the same or similar circumstances
- Accused's intoxication not relevant
  - Must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense

New Article 120, UCMJ

- Challenges
  - Statutes of limitations for rape and child abuse mean both old and new sex offenses will be in play for years
  - Dates of offenses
  - Current max punishments
  - Interim congressional max punishments
  - New max set in published EO

Questions? Comments?

CPT Traci Winston, USA
Administrative Law Team NGB-JA
703 607 5901 DSN 327 5901
Fax 3682 or 3684
Tracianna.winston@ngb.ang.af.mil

Thanks to Mr Jim Russell for his slides!
AFLOA/JAJM
James.Russell@pentagon.af.mil

SARC Bottom Line

- Multiple Responsibilities
  - Facilitator
  - Arbitrator
  - Educator
- Key to institutionalization
- Must be visible/engaged
- Spirit and intent
  - Rebalancing our approach